

C. PANOS

IBLA 79-459

Decided August 30, 1979

Appeal from decision of Wyoming State Office, Bureau of Land Management, disqualifying simultaneous oil and gas lease offer W 67745.

Affirmed.

1. Accounts: Payments – Oil and Gas Leases: Generally – Oil and Gas Leases:  
Applications: Generally – Oil and Gas Leases: Rentals – Payments: Generally

Where an offer is drawn No. 1 in a simultaneous oil and gas lease drawing and the offeror is notified by BLM that the rental due is \$1,955, the offer will be disqualified under 43 CFR 3112.4-1 when the offeror submits a check for \$1,954 within the time required, but fails to submit the \$1 deficiency within the allowed time.

APPEARANCES: David E. Salisbury, Esq., Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

C. Panos appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 11, 1979, disqualifying his simultaneous oil and gas lease offer W 67745 because he failed to submit the correct amount of rental due within the time required by 43 CFR 3112.4-1.

Appellant's drawing entry card was drawn with first priority in the March 1979 simultaneous oil and gas drawing for parcel WY 2844. 43 CFR 3112.4-1 requires that rental be received in the proper office within 15 days from the receipt of notice that such payment is due. The return receipt card for the notice shows that appellant received the notice on April 20, 1979. Therefore, payment was due on or before May 7, 1979.

On April 25, 1979, BLM received a check for \$1,954. The rental notice specified \$1,955 as the amount due. The State Office issued its decision disqualifying the lease offer because of failure to submit the correct amount of rental within the time allowed. Appellant received this decision on May 15, 1979, and sent a check for the rental deficiency (\$1) which was received by BLM on May 23, 1979. By letter of May 25, 1979, BLM informed appellant that its decision of May 11, 1979, disqualifying the lease offer still stood.

In his statement of reasons appellant refers to 43 CFR 3103.3-1 and 43 CFR 3111.1-1(e) which set forth the 10 percent rule. These regulations provide that an offer to lease with a rental payment deficient by not more than 10 percent is a curable defect and that the additional rental must be paid within 30 days from notice under penalty of cancellation of the lease. Appellant contends that these regulations are applicable to his case because his rental payment was deficient by less than 10 percent and the remainder of the payment was received by BLM within the 30 days allowed.

Appellant claims that these regulations have been applied interchangeably by the Board to simultaneous noncompetitive oil and gas lease offers and cites cases to support his proposition. He notes the addition of 43 CFR 3112.4-1 to the regulations in 1973, but claims it is irrelevant to the application of the 10 percent rule. He admits that 43 CFR 3112.4-1 does modify the first part of 43 CFR 3103.3-1 concerning submission of the first year's rental with the lease offer, but notes that it says nothing about a deficiency in the rental payment. Appellant reasons that if the persons adopting the new regulation had intended to change the applicability of the 10 percent rule, they would have explicitly stated so in the regulation.

[1] 43 CFR 3112.4-1, the regulation governing rental payments for simultaneous oil and gas lease offers, provides as follows:

A lease will be issued to the first drawee qualified to receive a lease upon payment of the first year's rental. Rental must be received in the proper office of the Bureau of Land Management within fifteen (15) days from the date of receipt of notice that such payment is due. The drawee failing to submit the rental payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing.

BLM properly rejected appellant's offer. The requirements of 43 CFR 3112.4-1 are clear and the penalty, automatic disqualification to receive the lease, is explicit. This requirement is strictly enforced by the Department. American Petrofina Company of Texas, 41 IBLA 126 (1979); Donald E. Jordan (Supp.), 41 IBLA 60 (1979);

Milton Knoll, 38 IBLA 319 (1978); Gavino San Diego, 36 IBLA 300 (1978); Susan Dawson, 35 IBLA 123 (1978), aff'd, Dawson v. Andrus, Civ. No. C 78-167 (D. Wyo. Filed March 22, 1979); Charles M. Brady, 33 IBLA 375 (1978); and cases cited.

Also, appellant's error cannot be waived in the face of intervening rights of the No. 2 and No. 3 drawees. Milton Knoll, supra, at 325. The Board considered the intervening rights of the second and third drawees in a similar situation in Donald Peters, 35 IBLA 290, 295, and stated that:

[a]ppellant's contention based on the arguendo assumption that if the payment did arrive late the authorized officer could nevertheless have accepted it and issued the lease to appellant is without merit. The regulation, 43 CFR 3112.4-1, plainly states, "The drawee failing to submit payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing". . . . The disqualification, being automatic, thus affords no latitude for any exercise of discretion. Moreover, this automatic disqualification advances the priority of the next drawee and precludes implementation of 43 CFR 1821.2-2(g), because the rights of a third party have intervened eo instante, upon the failure of the first drawee to submit payment timely. Robert D. Nininger, 16 IBLA 200 (1974), aff'd Nininger v. Morton, Civ. Action No. 74-1246 (D.D.C. filed March 25, 1975), wherein the Court stated the following conclusion of law: "\* \* \* The regulations 1810.2(b) and 3112.4-1, Title 43, Code of Federal Regulations, are mandatory and apply to the plaintiff. Said regulations do not permit the consideration of excuses for failure to remit payment" [Emphasis in original.]

As noted above, appellant claims that under the 10 percent rule in 43 CFR 3103.3-1 and 43 CFR 3111.1-1, his check for the deficiency was received on May 23, 1979, only 12 days after BLM had notified him of the deficiency and therefore within the 30-day period allowed by these regulations.

These regulations have not been applicable to simultaneous oil and gas lease offers since the regulations for simultaneous offers were amended in several respects, effective September 17, 1973, by Circular No. 2348, which was published in the Federal Register of August 17, 1973 (38 FR 22230). One of the amendments, section 3112.4-1, eliminated the requirement that the advance rental must be submitted with the simultaneous filing. Duncan Miller, 19 IBLA 133 (1975). The cases cited by appellant for the proposition that the 10 percent rule is applicable to simultaneous offers concerned cases

in which the offers were filed prior to the effective date of the new regulation. Therefore these cases are not applicable to the case in issue.

We do not construe these regulations to mean that the 10 percent rule is applicable to simultaneous oil and gas lease offers after the 1973 amendment. 43 CFR 3103.3-1 provides that each offer, when first filed, shall be accompanied by full payment of the first year's rental. This regulation governs over-the-counter offers and does not apply to simultaneous offers, because 43 CFR 3112.4-1 specifically states that rental for simultaneous offers must be received within 15 days from the date of receipt of notice that the payment was due.

Neither does 43 CFR 3111.1-1(e) apply to simultaneous offers. 43 CFR Part 3110 deals with noncompetitive leases. 43 CFR Subpart 3111 governs regular offers and 43 CFR Subpart 3112 governs simultaneous offers. 43 CFR 3111.1-1(e), the section on curable defects, sets forth the 10 percent rule. Since 43 CFR 3111.1-1(e) is a provision within 43 CFR Subpart 3111, it necessarily applies to regular offers. 43 CFR 3112.4-1, the regulation enumerating the requirements for rental payments for simultaneous offers, has no provision for the 10 percent rule.

The 10 percent rule in 43 CFR 3103.3-1 has a rational basis when applied to over-the-counter offers because the offeror often has no access to plats of survey and thus has no certain method of establishing acreages (and commensurately rentals) with exactitude. Milton Knoll, supra at 323.

Thus 43 CFR 3103.3-1 (1970), relied on by the dissent, provides for present payment of the rental (to accompany offer) whereas 43 CFR 3112.4-1 (1973), specifically covering simultaneous offers, provides for rental to be paid in the future (within 15 days from receipt of notice of rental being due, which of necessity takes place after the drawing of the offer). So, contrary to the dissent, the reasonable conclusion seems to be that an offeror cannot be required to pay rental along with the offer and at a future date after the offer is drawn, and that 43 CFR 3103.3-1 does not apply to simultaneous filings. Also, contrary to the dissent, Susan Dawson, supra, and Milton Knoll, supra, stand for the proposition they are cited for, that failure to comply with 43 CFR 3112.4-1 is grounds for rejection of the offer and this requirement is strictly enforced.

For these reasons we find that appellant's failure to remit the required rental within the time allowed by 43 CFR 3112.4-1 disqualifies him to receive the lease.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis  
Administrative Judge

I concur:

Edward W. Stuebing  
Administrative Judge

## ADMINISTRATIVE JUDGE GOSS DISSENTING:

I would award the lease to appellant, providing he otherwise qualifies.

Appellant's rental payment was received after his drawing entry card was drawn as No. 1 under Departmental simultaneous offer procedures for noncompetitive bidding. The payment was deficient by less than 10 percent of the full rental amount, and such deficiency was paid within 30 days of notice of the deficiency. Departmental regulation 43 CFR 3103.3-1 is controlling.

Section 3103.3-1 mandates the following action by the Department:

§ 3103.3-1 Rental requirements.

Each offer, when first filed, shall be accompanied by full payment of the first year's rental based on the total acreage if known, and if not known, on the basis of 40 acres for each smallest legal subdivision. An offer deficient in the first year's rental by not more than 10 percent will be approved by the signing officer provided all other requirements are met. The additional rental must be paid within 30 days from notice under penalty cancellation of the lease. [Emphasis added.]

The regulations set forth in Subpart 3103 apply to oil and gas leases in general. Indeed, the rentals for competitive and noncompetitive leases are set forth in section 3103.3.

From 1970 to 1973 there was no question but that section 3103.3-1 applied to competitive offers and to all regular offers, both over-the-counter and simultaneous. The addition of 43 CFR 3112.4-1, supra, in 1973 is irrelevant to the fact that the second sentence of section 3103.3-1 has not been amended; it continues to provide relief against the forfeiture of preference rights for competitive and all regular offerors when there has merely been a nominal deficiency in payment of rental. While section 3112.4-1 does modify the first part of 43 CFR 3103.3-1, concerning submission of the first year's rental with the lease offer, section 3112.4-1 was not intended to alter the pre-1973 protection against nominal deficiencies which was accorded to all regular offerors. There is no reason why the Department would have intended to amend section 3103.3-1 by implication, and thereby restrict its application to the protection of competitive bidders and the protection of the priorities of over-the-counter offerors who first file but whose payment is deficient in a nominal amount. Under

the majority opinion, despite identical statutory authorization as to the simultaneous and over-the-counter procedures, the Secretary intended to deny protection to the first drawn simultaneous offerors.

None of the cases cited in the main opinion are in point. Only Susan Dawson, 35 IBLA 123 (1978), and Milton Knoll, 38 IBLA 319 (1978), concern the 10 percent rule. The Dawson deficiency was more than 10 percent; hence the relief provided under section 3103.3-1 could in no event be invoked. In Knoll payment of \$39.97 was sent on May 26, 1978, without receipt of any notice of payment due. On June 21, the Bureau of Land Management sent Knoll a notice that the full rental payment of \$40 was then due. Knoll did not pay the 3 cents deficiency until October 9, 1978. It was held that Knoll had no right to the lease. Without considering the doctrine of de minimis in connection with Knoll, it is clear that application of the 10 percent rule was not at issue because Knoll failed to pay the 3 cents within the 30-day grace period permitted under section 3103.3-1.

Because 43 CFR 3103.3-1 is contained in "General" Subpart 3100, the normal construction is that the 10 percent rule should apply to all oil and gas leasing. Section 3103.3-1, and not 3112.4-1, is the section which specifically deals with nominal deficiencies in first year rentals.

Appellant would also be protected if it were deemed the regulations are ambiguous. The Department has repeatedly held that an ambiguity in regulations will not be applied to deprive an offeror of his preference right. "If there is doubt as to the meaning of an ambiguous regulation, the doubt should be resolved in favor of the applicant." Duncan Miller, 5 IBLA 35 (1972).

Joseph W. Goss  
Administrative Judge

